BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the matter of	)	
	)	
Implementation of Section 25	)	MM Docket No. 93-25
of the Cable Television Consumer	)	
Protection and Competition Act	)	
of 1992	)	

COMMENTS OF HOME BOX OFFICE

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April 28, 1997

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Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 93-25

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Home Box Office ("HBO"), a division of Time Warner Entertainment Co., L.P., hereby submits its comments in response to the Public Notice in the above-captioned proceeding.[1]

I. INTRODUCTION

In adopting the rules to implement the DBS service obligations in Section 335 of the Communications Act, the Commission should:

- Define "provider of DBS service" to exclude C-band satellite transmissions and those DBS providers controlling six or fewer transponders;

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[1] Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Service Obligations, Comments Sought in DBS Public Interest Rulemaking in MM Docket No. 93-25, FCC 97-24, Public Notice (released Jan. 31, 1997); Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Service Obligations, Notice of Proposed Rule Making in MM Docket No. 93-25, 8 FCC Rcd. 1589 (1993) ("NPRM").

- Clarify that the political access obligations in Sections 312(a)(7) and 315 may not be imposed on individual programming services, such as HBO; and
- Hold that DBS operators who jointly market and offer their services are not required to set aside any more capacity than would be required individually.

II. THE DEFINITION OF "PROVIDER OF DBS SERVICE" SHOULD NOT INCLUDE C-BAND SATELLITE TRANSMISSIONS OR PROVIDERS WHO CONTROL SIX OR FEWER TRANSPONDERS.

HBO supports the Commission's tentative conclusion that C-band satellite operations are not subject to the obligations in Section 335.[2] Section 335 is limited to "provider[s] of direct broadcast satellite service" which are defined in subsection (b)(5) as either "a licensee of a Ku-band satellite system under Part 100" of the Commission's rules, or a "distributor . . . using a Ku-band fixed service satellite" under Part 25 of the Commission's rules.[3] Because the definition focuses exclusively on the Ku-band, C-band satellite transmissions are not covered.[4] Given the statute's plain language, the NPRM appropriately concludes that "Congress apparently intended to exclude C-band DBS operations from the obligations to be imposed by Section 25."[5] HBO agrees with this analysis.[6] Finally, HBO notes that

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2 See NPRM at 1590.

3 47 U.S.C. § 335(b)(5).

4 Section 335 is inapplicable to all C-band transmissions whether directed to cable headends or directly to subscribers' homes.

5 NPRM at 1590.

all parties addressing this issue in the original comments submitted in this proceeding agreed that the Section 335 obligations should not be imposed upon C-band transmissions.[7]

HBO also supports a definition of "provider of DBS service" that does not include entities controlling six or fewer transponders. With respect to Part 25 DBS service providers, the statute grants the Commission the discretion not to apply the Section 335 obligations on those distributors controlling "a minimum number of channels (as specified by Commission regulation)."[8] Likewise, HBO believes the Commission has the

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[6] The Commission may not deviate from the clear statutory language drafted by Congress. See North Dakota v. U.S., 460 U.S. 300, 312 (1983)(clear and unambiguous language must be "regarded as conclusive.") (citation omitted); Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order in CC Docket No. 92-90, 7 FCC Rcd. 8752, 8755 (1992)(FCC has long-standing practice of adopting definitions "which best reflect legislative intent.").

[7] See, e.g., Comments of Consumer Federation of America at 2; Comments of DIRECTV, Inc. at 7. This analysis is further supported by the fact that the Commission historically has differentiated C-band services from those in the Ku-band. In discussing direct-to-home satellite services in its Annual Competition Reports, for example, the Commission treated as "direct broadcast satellite services" both Part 100 licensees and Part 25 distributors using Ku-band transmissions. By contrast, C-band direct-to-home services were discussed as "home satellite" services and analyzed separately from the DBS services. Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Third Annual Report in CS Docket No. 96-133, 5 Comm. Reg. 1164, 1174-79 (1997); Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Second Annual Report in CS Docket No. 95-61, 11 FCC Rcd. 2060, 2080 (1995); and Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, First Report in CS Docket No. 94-48, 9 FCC Rcd. 7442, 7473 (1994).

[8] 47 U.S.C. § 335(b)(5)(A)(ii).

discretion to similarly exempt Part 100 DBS programming providers controlling a *de minimis* number of transponders from Section 335 obligations. In its Notice, the Commission requested comment on the minimum number of channels that would trigger the obligations of Section 335.[9] HBO believes that an analogous situation can be found in the Commission's EEO rules which exempt MVPDs that offer six or fewer channels of commonly-owned video programming over a leased transport facility from its EEO requirements.[10] HBO believes that the EEO obligations are similar in nature to the type of public interest obligations contained in Section 335.[11] Thus, the EEO rules support an exception to the definition of "provider of DBS service" when such provider controls six or fewer transponders.[12]

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[9] NPRM at 1591.

[10] In the Matter of Implementation of Section 22 of the Cable Television Consumer Protection and Competition Act of 1992, Equal Employment Opportunities, Report and Order in MM Docket No. 92-261, 8 FCC Rcd. 5389, 5399 (1993). See also 47 C.F.R. § 76.71(a).

[11] In the Matter of Implementation of Commission's Equal Employment Opportunity Rules, Report in MM Docket No. 94-34, 9 FCC Rcd. 6276, 6278 (1994).

[12] While the EEO exception specifically applies to "channels," HBO maintains that for DBS providers "transponders" is a better measure. With six transponders, a DBS provider is capable of providing approximately 50 channels; this is relatively a small number when compared to those DBS providers who offer 200 to 300 channels.

III. THE SECTION 312(a)(7) AND SECTION 315 OBLIGATIONS MAY NOT BE IMPOSED ON INDIVIDUAL PROGRAMMING SERVICES.

Section 312(a)(7) requires broadcast stations to permit legally qualified candidates for federal office to purchase reasonable amounts of time on behalf of their candidacy.[13] Section 315 requires broadcast stations to provide equal access to all candidates for any public office.[14] Section 335 directs the Commission to make the political access obligations of Sections 312(a)(7) and 315 applicable to "providers of direct broadcast satellite service." As discussed below, neither obligation may be imposed on individual programming services.

A. The Plain Language Of The Statute Limits Its Application To DBS Operators.

It is axiomatic that plain statutory language must be given effect.[15] Section 335 clearly applies the political access obligations only to "provider[s] of direct broadcast satellite service." The definition of a "provider of direct broadcast satellite service" is limited to certain "licensee[s]" and "distributor[s]."[16] Individual programming services are neither Commission "licensees" nor "distributors;" thus, they are outside the scope of Section 335.

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[13] 47 U.S.C. § 312(a)(7).

[14] 47 U.S.C. § 315.

[15] See United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989); North Dakota, 460 U.S. at 312. See also n. 6, herein.

[16] 47 U.S.C. § 335(b)(5).

This is consistent with Sections 312(a)(7) and 315, neither of which make any reference to individual programming services.[17] In fact, in 1974, Congress amended Section 315 to include a cable system within the definitions of "broadcasting station" and "licensee," thereby applying Section 315 obligations to cable operator-originated programming.[18] Had Congress intended to impose the Section 315 obligations upon individual programming services, it could have done so at the time it amended the provision to apply to cable operators. Similarly, of course, the Commission already has recognized that Section 312(a)(7) is limited to broadcasters.[19]

B. The Commission Lacks Authority To Impose Section 312(A)(7) And 315 Obligations On Individual Programming Services.

The Commission has no regulatory authority over individual nonbroadcast programming services and therefore cannot impose Section 335 obligations on them. The Commission has never asserted direct general jurisdiction over such services. Furthermore, in analogous circumstances, the Commission has

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17 See 47 U.S.C. § 312(a)(7) & § 315.

18 47 U.S.C. § 315(c)(1)-(2).

19 NPRM at 1594, n. 25. See also Codification of the Commission's Political Programming Policies, Memorandum Opinion and Order in MM Docket No. 91-168, 7 FCC Rcd. 4611, 4612 (1992); see also Codification of the Commission's Political Programming Policies, Report and Order in MM Docket No. 91-168, 7 FCC Rcd. 678, 680 n. 11 (1991).

expressed doubts concerning its power to impose equal time and other obligations upon nonbroadcast programmers.[20]

In the Fairness NPRM, for example, the Commission stated that its regulatory authority was limited with respect to nonbroadcast programmers carried on cable television. The Commission noted that in the broadcast arena, it possessed enforcement authority over broadcast stations and through that authority was capable of ensuring that the broadcast networks made equal opportunities available for political candidates.[21] With respect to cable programmers, however, the Commission said:

> It is not at all clear that [the broadcast] pattern could be followed in the cable context where neither the program suppliers nor distributors are Commission licensees. . . . These same practical problems in obtaining compliance might not be capable of similar resolution in the cable context because our limited cable jurisdiction might preclude compliance through cable networks.[22]

The same jurisdiction and enforcement problems are raised with individual program services distributed by DBS operators.

C. There Are Particularly Strong Policy Reasons For Not Applying The Section 312(a)(7) and 315 Obligations to Premium Programming Services.

Not only is the Commission legally constrained from imposing the obligations in Sections 312(a)(7) and 315 on individual

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[20] See Amendment of the Commission's Rules Concerning The Fairness Doctrine and Political Cablecasting Requirements for Cable Television Systems, Notice of Proposed Rulemaking in MM Docket No. 83-331, 48 Fed. Reg. 26472, 26480-81 (1983) ("Fairness NPRM").

[21] Id. at 26780.

[22] Id.

programming services, in the case of premium services, there are particularly strong policy reasons against doing so. The Commission has recognized that the political broadcast obligations were "based on a system of broadcasting which is supported by commercial advertising."[23] Premium services like HBO provide subscription programming with no commercial advertisements. HBO has spent the last 20 years investing enormous capital and other resources to build a brand identity with consumers for its HBO and CINEMAX services. A critical part of that identity is that both HBO and CINEMAX offer commercial free programming to consumers. The political advertising obligations are fundamentally inconsistent with that identity.

Moreover, severe practical problems would arise from any attempt to impose Section 315 obligations upon premium services such as HBO. For example, Section 315 requires that advertising time be made available for political candidates at the "lowest unit charge," i.e., the least amount assessed by a station for the particular time a candidate requests a commercial spot.[24] HBO, like most premium services, carries no advertisements and therefore does not have a lowest unit charge.

Finally, the Commission should not require providers of DBS service to satisfy their obligations under Sections 312(a)(7) and 315 on a channel-by-channel basis. Such a requirement could effectively impose the political access obligations on individual

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23 Id.

24 47 U.S.C. § 315(b)(1).

programming services, since each programmer ultimately would confront the possibility of making time from its programming service available for political advertisements.

IV. THE COMMISSION SHOULD NOT REQUIRE DBS OPERATORS WHO JOINTLY MARKET AND OFFER THEIR SERVICES TO SET ASIDE ANY MORE CAPACITY THAN WOULD BE REQUIRED INDIVIDUALLY.

HBO believes that Section 335(b), which requires DBS operators to reserve between four and seven percent of their capacity for "noncommercial programming of an educational or informational nature," violates the First Amendment.[25] However, any rules adopted pursuant to Section 335(b) should clearly specify that DBS operators who jointly market their services are not required to set aside more capacity than they would be required to set aside in their individual capacity. Consider, for example, two DBS operators that jointly market their services, one with 100 channels and the other with 50 channels. Assuming a four percent set-aside requirement, the operator with 100 channels should be required to set aside four channels (four percent of 100 channels) and the operator with 50 channels should be required to set aside two channels (four percent of 50 channels). This would be consistent with the goal of making four percent of 150 channels, or six total channels, available for educational or informational programming. In other words, simply because the services are jointly marketed, each of the operators

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[25] Time Warner Entertainment, L.P., has filed an amicus curiae brief in a challenge to Section 335(b). Time Warner Entertainment Co. v. FCC, 105 F.3d 723 (D.C. Cir. 1997)(Williams, J., dissenting).

should not be required to set aside capacity in relation to the others channels, i.e., four percent of 150 channels. Such an interpretation would result in 12 of 150 channels being set aside, or twice the number contemplated by the four percent requirement. Rather, each operator in this example should be required to set aside four percent of its channels.

V. CONCLUSION

For the foregoing reasons, the Commission should not (1) include C-band satellite transmission or providers with control of six or fewer transponders in the definition of "provider of DBS service"; (2) impose political access obligations on individual programming services; and (3) require DBS operators who jointly market their services to set aside any more capacity than would be required individually.

Respectfully submitted,

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